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FILED

SEP 14 195

IN THE

Supreme Court of the United States

October Term, 1951

No. 57

VICENTE MORENO, *Petitioner*

v.

THE UNITED STATES

On Petition for Writ of Certiorari to the United States Court of Claims

REPLY BRIEF OF PETITIONER TO ANSWERING BRIEF OF THE UNITED STATES

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WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

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REPLY BRIEF OF PETITIONER TO ANSWERING BRIEF OF THE UNITED STATES

The material facts as set forth in the Court of Claims' Special Findings of Fact (R. 18-26), and the petition and briefs of the parties herein are not in dispute.

It is petitioner's contention that the Army's final determination is contrary to its and the Court's Special Findings of Fact, and the law, in denying petitioner his back pay and allowance while an officer in the U. S. Army, during the period he was "*in the hands of the enemy,*" the Japanese Army, from the time they conquered, occupied and controlled the Philippine Islands, until they were reconquered by the U. S. Army. Petitioner was found to have been loyal to the United States during that period. Petitioner was retired and awarded credit and is being *paid for continuous active*

service from the time of his enlistment in 1924, until his discharge as of February 28, 1950, but the Army has wrongfully and without authority withheld petitioner's pay during the period he was confined in the Philippine Islands during their occupation by the Japanese Army.

The Navy Department, contrary to the erroneous policy of the Army Department, has paid its Filipino civilian employees and Filipino members of the United States Navy for the period they were in the Philippines during the Japanese Army occupation, in recognition of their contractual and statutory rights to pay and their rights under the Missing Persons Act, in all cases except where a party was found to have been disloyal to the United States, or absent from his post of duty without authority.

The Army cannot justify withholding from petitioner and members of the United States Army their back pay in defiance of the law when Filipino civilian employees and members of the United States Navy were paid under the same or similar circumstances.[1]

---

[1] DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

JAG:II:3:RT:evs

Lieutenant Colonel Manuel Q. Salientes, GSC, AFP
Military Attache
Embassy of the Philippines
Washington, D. C.

My dear Colonel Salientes:

Reference is made to your letter of 13 December 1950, addressed to the Foreign Liaison Officer, Department of the Navy, which has been referred to this Office with request that reply be made direct to you.

Your letter requests information on the following points in connection with the application by the U. S. Navy of the provisions of the Missing Persons Act (Act of Congress, approved 7 March 1942, as amended, 50 U. S. C. App. 1001-1015) with respect to Filipino civilian and naval personnel in the service of the U. S. Navy during World War II:

(a) For what periods were Filipino civilian employees who were captured and interned by the enemy paid arrears in pay?

(b) For what periods were Filipino naval personnel in military service of the U. S. Navy who were captured and interned by the enemy paid their arrears in pay?

(c) In cases where pay was denied for certain periods, if any, what policy was adopted in denying entitlement to such pay? As a general rule, entitlement to full salary arrears for civilian employees was computed from 10 December 1941 to 28 February 1945, except when the records indicated that payment of regular wages was made by the activity to which the employee was attached on a date subsequent to 10 December 1941. In that case the payment under the Missing Persons Act started with the day following the date of last payment and continued through 28 February 1945, the standard separation date.

In addition to the regular pay accrued, payment was made at the regular rate for a maximum of ninety days' annual leave. Allowed claims from heirs of deceased personnel are paid to include the standard separation date, 28 February 1945, regardless of the actual date of death.

Filipino naval personnel were paid their arrears in pay for the entire missing period, beginning with the date following the date of their last payment, which could have occurred any time subsequent to 10 December 1941, through the date they were declared a survivor.

Pay to civilian and military personnel was denied in whole where reasonable proof of collaboration with the enemy was established. Payment was also denied to civilian employees who were in an unauthorized leave status at the date entitlement to pay under the Missing Persons Act commenced.

While the dates furnished above were the dates used generally, insofar as possible each case was settled on its own merits and specific dates applicable to a particular case were used when available. For the purposes of expediting settlements and arriving at the true facts in each case, the Secretary of the Navy, under authority of the Missing Persons Act, established the Mobile Personnel and Settlement Unit and authorized the Officer-in-Charge of this Unit to act for him in examining and settling claims of civilian personnel of the Navy and Marine Corps in liberated areas outside the continental limits of the United States.

I regret that the reply to your letter has been so long delayed.

Sincerely yours,

/s/ G. L. RUSSELL
Rear Admiral, U. S. Navy
Judge Advocate General of
the Navy

A TRUE COPY:

In the Hands of the Enemy

The undisputed facts show that petitioner and members of the U. S. Army, were taken prisoners by the Japanese Army and were confined in the Philippines under complete Japanese control until their recapture by the American Army. The Court of Claims stated in its first decision, "We assume, without deciding, that a prisoner paroled as the plaintiff was, in his homeland which was occupied by the enemy was

> 'in the hands of the enemy' as these words are used in Section 1006" (of the Missing Persons Act).

Regardless of the above facts the Army denied petitioner's claim, in defiance of the clear language in Section 1006 of the Act.

As stated in *Standard-Vacuum Company* v. *U. S.*, 339 U. S. 157, 159, it is "judicially known that the Japanese were, for all practical purposes, in complete control of the Philippine Islands by May 1942 and continued in control until sometime subsequent to October 1944, when the United States Army returned."

Since petitioner was "in the hands of the enemy" and found to be loyal to the United States during the time of the Japanese occupation and control of the Philippines, the Army had no jurisdiction under Section 1006 of the Act to deny petitioner his pay and allowance, and its refusal to do so is in defiance of the law. (*Estep* v. *U. S.*, 327 U. S. 114, 121).

Respondent, in his brief, only refers to the status of persons "(1) missing, (2) missing in action, (3) interned in a neutral country, (4) captured by an enemy, or (5) beleaguered or besieged", who are entitled to pay under the Missing Persons Act, but omits the provision of Section 1006 of the Act, which provides "*that a*

*person * * * alive and in the hands of the enemy * * *" is entitled to his pay.* (R. 28).

In *Re Territo,* 156 F. 2nd 142, the Court held that where the defendant was captured by the U. S. Army in Italy, was brought to the United States, was paroled under oath and employed, he remains a prisoner of war until the peace treaty has been negotiated with Italy.

It is respectfully submitted that neither the head of any department nor the courts have the authority to deny a right expressly and clearly provided for by statute.

Petitioner's Employment

Not only was the Army decision upheld by the Court, in violation of Section 1006, but it was a direct violation of the provision of Section 1009 of the Act which states immediately following the words "and all such determinations shall be conclusive:"

> "*PROVIDED,* That no such account shall be charged or debited with any amount that any person in the lands of an enemy may receive or be entitled to receive from, or have placed to his credit by such enemy as pay, wages, allowances, or other compensation." (R. 15, 16).

Here the Army did the very thing which the above proviso prohibited. It held that petitioner was not entitled to his pay and allowance for the period he was employed by the Japanese controlled agency, although he aided the guerillas and did intelligence work during that period, and was found to have been loyal to the United States at all times. If the Army had deducted from Petitioner's pay whatever small wage he received, that alone would have been contrary to the above proviso, but here the Army went beyond that and deducted petitioner's entire pay and allowances for the period of his employment. He risked his life by his guerrilla and

intelligence work for the United States, and received as his reward a denial of the pay due him by the Army because he was forced to work or starve.

Under the International Convention of the 27th of July 1929, relative to the treatment of prisoners of war, Geneva, which Japan accepted, Article 27 provides that if a prisoner of war requests work, this shall be found for them, including work for the State, public administration or private individuals, as provided under Article 34.[2]

It is evident that the Army exceeded its jurisdiction in denying petitioner's pay, as the determination is clearly in defiance of Section 1009 of the Act and the law.

The Administrative Procedure Act

This Act covers the type of claim here involved, contrary to respondent's argument on pages 7 and 8 of its brief. Section 1001 of 5 U. S. C. exempts from the Act military or naval authority exercised in the field of war or in occupied territory, or functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947. Here petitioner's claim was denied by the Army on April 28, 1948. The functions which by law require the Army to pay petitioner have not expired, either under his contractual and statutory right or under the Missing Persons Act. The Army's determination here does not cover military or naval authority exercised in the field

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[2] The above Convention also provides "that 'Prisoners of War' may be interned in a town or other places, and may be required not to go beyond certain fixed limits. They may also be interned in fenced camps; they shall not be confined or imprisoned except as a measure indispensable for safety or health and only so long as circumstances exist which necessitates such a measure." (Article 9). See also *In re Territo*, 156 F. 2nd 142.

of war. (See annotation 94 L. Ed. 646, citing *Snyder* v. *Buck*, 75 F. Supp. 902, and *Kain Koon Wan* v. *E. E. Black, Ltd.*, 75 F. Supp. 553).

Respondent argues, page 8 of its brief, "that this termination provision means, of course, that the operative provisions of the Administrative Procedure Act, including the Judicial review provisions of Section 10 * * * are not applicable to functions exercised by the Army Department under the Missing Persons Act." The argument is based, as far as petitioner can determine on the Provisions of Section 3 of the Joint Resolution of July 25, 1945, c. 327, 61 Stat. 451, which provides that the date of *July 25, 1947*, shall be deemed to be the termination date of any state of war theretofore declared by Congress and of national emergencies proclaimed by the President. However, Section 4(c) of the Act of *June 24, 1948*, C, 625 Title 1, 62 Stat. 608, deleted from the operation Sec. 3 of said Joint Resolution, the Act of March 7, 1942, 56, Stat. 143-148, Ch. 166,—the Missing Persons Act.

An Amendment to the Missing Persons Act (H. R. 1199) was passed by the House by unanimous consent on or about June 4, 1951, which is evident that the Act has not expired.

Arbitrary or Capricious

Respondent states on page 9 of its brief that if the Court below had not exercised a right of review, it would have been in no position to conclude that the Army's determination was neither arbitrary nor capricious and that it should not therefore be set aside. We do not believe that the Court either exercised a right of review or concluded that the Army's determination was neither arbitrary nor capricious. The Court held,—

> 1. "* * * Congress must of meant, by Section 1009 as a whole, that the troublesome questions arising under the Missing Persons Act *were not to be the subject of litigation.*" *and*

as whether petitioner was,—

> 2. "* * * in the status of a person 'captured by an enemy, beleaguered or besieged' as the statute provides, is difficult indeed. There is no ready answer to it, and it cannot be said that the answer which the department gave was arbitrary and capricious." (R. 31).

Under the above ruling the Court held (1) that petitioner's claim was not subject to litigation, which deprives the Court of judicial review, and (2) that there was no ready answer, and therefore the Court did not decide whether the Army's determination was arbitrary and capricious.

It is noted the Court's decision under (2) quoted above was confined to the status of a person (a) captured by an enemy, and (b) beleaguered and besieged, and not to whether petitioner was "in the hands of an enemy", as he was, which entitles him to his pay and allowances under Section 1006.

The Court also failed in considering Section 1009 in holding that the Army's determination was conclusive to pass upon the material *proviso* in *Section 1009*, supra, which prohibits the deduction and withholding of petitioner's pay by virtue of his employment. The Court, in printing part of Section 1009, deleted this material *proviso*. (R. 29).

Ultimate Findings and Conclusion of Law Are in Conflict With Findings of Fact, the Statutory Right to Pay and Missing Persons Act

The Court failed and refused to make ultimate findings in accordance with its findings of fact as follows:

1. It found that petitioner was captured and taken prisoner by the Japanese Army on April 9, 1942, (R. 19) and confined to the Philippines until they were recaptured by the United States. (R. 20). However, the Court refused to make an ultimate finding based upon the above, the undisputed facts, that petitioner was "in the hands of the enemy" during the above period, although the Court, in its first opinion stated,—"We think without deciding, that a prisoner paroled as the plaintiff was, in his homeland which was occupied by the enemy was *'in the hands of the enemy'*, as those words are used in Section 1006."

2. The Court in its ultimate finding in construing Section 1009, failed and refused to find that the proviso in said section prohibited the Army from deducting from petitioner's account any pay, wages, allowances, or other compensation he received from the enemy.

Respondent claims that the Army's determination is conclusive under Section 1009, which the Court sustained (R. 30, 31), relying upon the following part of the section:

> "Determinations are authorized to be made by the head of the department concerned, or by such subordinate as he may designate, of entitlement of any person under provisions of this Act to pay and allowances, including credits and charges in his account, and all such determinations shall be conclusive: *PROVIDED, that no such account shall be charged or debited with any amount that any person in the lands of an enemy may receive or be entitled to receive from, or have placed to his credit by such enemy as pay, wages, allowances, or other compensation* * * *" (50 U. S. C. A. App. Sec. 1009).

Although the part underscored by us was not passed upon by the court it clearly prohibits the Army from making a determination contrary to the express terms therein, but the Army did so, and held that petitioner

was not entitled to his pay during the period of employment under a Japanese controlled agency, although "he was in position to aid the guerrillas, and that he did aid them, in his capacity as employee of the puppet agency," (R. 5), and was loyal to the United States during that period. (R. 21).

Since the Court's ultimate findings, conclusion of law, and judgment are in conflict with the findings of fact, and in defiance of the Missing Persons Act and the law, the judgment below should be reversed. (*U. S.* v. *Esmault-Pilterie*, 299 U. S. 201, 205-206; *U. S.* v. *Seminole Nation*, 299 U. S. 417, 422[3]; *U. S.* v. *Penn Foundry & Mfg. Co.*, 337 U. S. 198.[4]

Conflicting Determinations of Army

The Army made seven determinations as to petitioner's status[5] from the time he was taken prisoner until

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[3] A Court of Claims judgment "may not be upheld as to any item that is not supported by definite findings of facts extending to all essential issues and which, unaided by statements in the Court's conclusions of law or its opinion, are clearly sufficient to entitle plaintiff to recover." 299 U. S. at 422.

[4] As the affirmative evidentiary findings made by the Court add up to an inescapable ultimate finding that petitioner is entitled to his pay and allowances, the judgment of the Court of Claims should be reversed and the cause remanded with direction to enter judgment in favor of petitioner. 337 U. S. at 212-214.

[5] (a) *May 1942*—by Col. Hilsman,—that the prisoners would draw full pay until mustered out of the service. (R. 25).
(b) *December 8, 1944*—by General MacArthur,—that parole and oath was signed under duress and not valid. (R. 25, 26).
(c) *May 3, 1945*—Headquarters of United States Army,—that plaintiff was beleaguered, prisoner of war and missing in action from *February 8, 1942* to *January 27, 1945*. (Ex. C to Stipulation of Facts).
(d) *December 7, 1945*—Headquarters of United States Army, —that plaintiff was loyal to the United States during period of Japanese occupation (R. 21).
(e) *March 12, 1946*—Headquarters of United States Army,—

the United States recaptured the Philippines; however, the determination that he was loyal to the United States was never changed. (Respondent's Brief, pages 4, 5; R. 21).

As the seven determinations and constructions by respondent were neither uniform, general, nor long continued, and the Act is not ambiguous, the final determination cannot be given the force and effect of law. (*U. S.* v. *Falk*, 204 U. S. 142; *National Lead Co.* v. *U. S.*, 252 U. S. 140).

Treatment by Japanese

Respondent contends (Brief, pages 10-11) that the Army's determination was reasonable, and that although the Japanese occupation of the Philippine Islands involved detailed control over Philippine life, that it would be hard to impute to Congress an intent to allow full military pay and allowances to those who, like petitioner, took paying jobs with Japanese puppet agencies during the occupation. Congress, in amending the Missing Persons Act, specifically provided for such cases and prohibited such deduction during the occupation of pay, wages, allowances or other compensation received from the enemy, under Section 1009 of the Act. The intention of Congress and the purpose of the above pro-

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that plaintiff was not in casualty status from *October 1, 1942* to *January 27, 1945*. (Ex. E. of Stipulation).

(f) *June 3, 1946*—Headquarters of United States Army,—that plaintiff was beleaguered, prisoner of war, and missing in action, but not in casualty status from *April 1, 1943* to *October 15, 1944*.

(g) *April 28, 1948*—Philippine Ryukus Command,—that plaintiff was not entitled to pay during period employed by puppet agency. (Ex. G of Stipulation; R. 4, 5).

Petitioner was retired on February 28, 1950, and given full credit for continuous active service in the United States Army from March 3, 1924.

vision is set out in No. 241 of the printed Hearings on H. R. 4405, House of Representatives, Committee on Naval Affairs, Tuesday, June 13, 1944, in the proposed Amendment to the Missing Persons Act, on page 2303[6].

The opinion of Col. Luis P. Torres, the Judge Advocate General of the Philippine Army, dated 4 June 1946, was rendered at the request of the Commanding General of the A. F. W. E. S. P. A., and was marked "secret, confidential and restricted", and filed by the Army with the Committee of Congress, 80th Congress, 1st Session, with the then pending Bill "Extending the Missing Persons Act to certain Filipino". The Court may, therefore, take judicial notice of this opinion (*U. S. v. Penn Foundry & Mfg. Co.*, 337 U. S. 198 at 216). Col. Torres, in his opinion, states that the Japanese did not actually release the prisoners as they were kept under the supervision and strict surveillance of the Japanese Kempei-tai or military police.[7]

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[6] "7. That the accounts of a person in the hands of the enemy shall not be charged with any amount he may receive or that may be credited to his account by such enemy as pay, wages, allowances, or other compensation. * * * ."

"Some enemy governments are making payments to American prisoners of war or are crediting their accounts with pay at agreed rates. What Japan is doing, is not definitely known. The amounts paid or credited are relatively small and are only to officers. It is understood that enlisted men get some small amount of pay for work done, but get no regular pay from the holding power. In one camp, at least, the officer prisoners are pooling all amounts credited for the purchase of necessities and comfort for all prisoners, officers and enlisted men. A policy that these meager amounts are not to be charged to the officers or men who may receive them is considered desirable, and provision to that effect is incorporated in the item referred to under (7) above."

[7] "They were required to report periodically to the military police or some Japanese commanders in their respective localities; they were compelled, under threat, to be confined at Fort Santiago or any of its branches, to join the Japanese constabulary which was then in the process of formation, or otherwise constrained to seek employ-

ment in some governmental agency controlled by the Japanese Military Government for the purpose of keeping track of the activities of the prisoners. There were many cases of prisoners of war who were taken from Capas or other concentration camps and given specific assignments under some Japanese military commander. The result was that in whatever situation he found himself, whether by joining the Japanese controlled constabulary, by accepting employment in some governmental agency, or by being permitted to engage in some civilian or private activity in order to make a livelihood for himself and his family, the Filipino prisoner of war was always shadowed by the Japanese high command through the Kempei-tai or military police. No better proof can be offered in connection therewith than the contents of an order furnished each prisoner upon his so-called release under oath, whereby he was required to report *'when you are dead'* (see Appendix X). His freedom of action, nay, his freedom of thought, having thus become things of the past, it was next to impossible for him to move around freely in his neighborhood, because there were eyes watching his movements and tongues or pens ever ready to report him to the Kempei-tai, which invariably meant his arrest and confinement for an undetermined period of time, if not death caused by revoltingly unheard of, cruel and inhuman torture, of which his family was vaguely informed when they received his watch, wallet or other last personal belonging." ("The Case for the Philippine Army (U. S. A. F. F. E.) Veterans by Joaquin Miguel Elizalde", pp. 38, 39).

"All the activities of the inhabitants, even those of strictly private nature, were under control or regimentation. Foodstuffs, particularly those commodities that were very essential for the maintenance of the population, were so administered that priorities were given only to the Japanese forces and civilians, which accounted for the exorbitant prices which seriously affected living conditions in these Islands. The prices of prime commodities having increased from day to day, a man depending on his salary for a living hardly had enough to maintain his family for the first few days of the month. He had to devise other means, such as selling his furniture and other belongings piece by piece, if he had to survive during the remaining days of the month. * * *." ("The Case for the Philippine Army (U. S. A. F. F. E.) Veterans by Joaquin Miguel Elizalde", pp. 40, 41).

The extent of Japanese control over all phases of Philippine life did not pass unnoticed by the United States Congress, which, in a joint resolution approved June 29, 1944, declared:

> "Whereas the Japanese are now in possession and control of the *land, peoples, business, communication, and institutions* of the Commonwealth of the Philippines, and because of these circumstances the Filipino people are denied the free use and

Statutory and Contractual Right to Pay

Petitioner again urges as set forth in his Petition, page 14, that aside from his rights under the Missing Persons Act, he is entitled to his pay and allowances as provided by statute during the period he was an officer in the U. S. Army.

Petitioner is entitled to his pay and allowances, not because he performed certain work or stayed at a certain place; but because he held the office as an officer in the U. S. Army as created by statute. (*U. S.* v. *Andrews*, 240 U. S. 90; *U. S.* v. *Williamson*, 23 Wall. 411; *U. S.* v. *Wickersham*, 201 U. S. 390). Under the above authorities, the work and place of his confinement is immaterial, since he did not disobey orders and was loyal to, and a member of, the U. S. Army.

The pay of an officer cannot be withheld under Section 877, Title 10 U. S. C. A., when he is acting under an order he is bound to obey. (*Smith* v. *U. S.*, 24 Ct. Cls. 209). Petitioner was ordered to surrender and to be courteous and obedient to the Japanese Army and their orders. (R. 24). He was not indebted to the Army and the Army had no right to withhold his pay. (*Baker* v. *McCarl*, 24 F. 2d 897; *McCarl* v. *Lond*, 38 F. 2d 943; *White* v. *U. S.*, 72 Ct. Cls. 375; *Thomas Kenny* v. *U. S.*, 62 Ct. Cls. 328, 338; *McCarl* v. *Pence*, 18 F. 2d 809).

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employment of the processes and political institutions jointly established by the Government of the United States and the Commonwealth of the Philippines for the transaction of private and public business and for the maintenance of liberty, law and order, and justice in the Philippine Islands.

"Whereas by their possession and invasion the Japanese have attempted to frustrate the free processes to independence in the Philippines by substituting therefor their own puppet government which was conceived in intrigue, *born in coercion*, and reared primarily for the purpose of Japanese selfishness and aggrandizement and not to achieve the independence and freedom of the Filipino people."

Even if petitioner had agreed to waive his right to pay and allowances while he was an officer of the U. S. Army in the Philippines during the Japanese occupation, it would be a complete nullity as his pay is fixed by statute, which he is entitled to recover. (*Glavey* v. *U. S.*, 182 U. S. 595; *U. S.* v. *Andrews*, 240 U. S. 90; *McMath* v. *U. S.*, 248 U. S. 151; *Ford* v. *U. S.*, 69 F. Supp. 332; *U. S.* v. *James*, 100 F. 2d 65).

The courts have always held that it requires the decision of a courtmartial to deprive an officer or enlisted man of his pay and emoluments (*Carrington* v. *U. S.*, 46 Ct. Cls. 279; *Harry Walsh* v. *U. S.*, 43 Ct. Cls. 225; *James L. White* v. *U. S.*, 72 Ct. Cls. 459).

The duty of the Army to pay plaintiff "is so plainly prescribed as to be free from doubt and equivalent to a positive command, and, therefore, is so far ministerial that its performance may be compelled by mandamus." (*Miguel* v. *McCarl*, 291 U. S. 442, 445).

Conclusion

For the reason stated herein, and in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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